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Public Prosecutor v Rita Maziha bt Pauzi

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS WA–42K-16–10 OF 2018 AND WA-42S-30–09 OF 2018
AHMAD SHAHRIR JC
14 FEBRUARY 2020

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused jointly charged for cheating under s 420 of the Penal Code — Accused convicted and sentenced to imprisonment of three years from the date of arrest and a fine of RM20,000 in default 12 months of imprisonment — Whether prosecution had proved a prima facie case — Whether prosecution failed to prove dishonesty on the part of the accused

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This was an appeal by the accused against the conviction and sentence of the sessions court and the prosecution's cross appeal against the inadequacy of the sentence imposed. The accused was jointly charged with Mohd Sirajdeen bin Haja Maideen (Mohd Sirajdeen) person for the offence of cheating committed under s 420 of the Penal Code read together with s 34 of the same code. At the end of the prosecution's case the learned sessions court judge had amended the charge under s 158 of the Criminal Procedure Code and the accused was ordered to enter her defence on the amended charge. At the end of the defence case, the learned sessions judge had convicted and sentenced the accused to imprisonment for a period of three years from the date of arrest and a fine of RM20,000 in default 12 months of imprisonment. In a separate case Mohd Sirajdeen was in turn jointly charged with the accused for the same offence committed in furtherance of common intention. In that same case, Mohd Sirajdeen was also charged for the offence of carrying on the business of moneylending without a valid licence under s 5(2) of the Moneylenders Act 1951. In this case, Mohd Sirajdeen was acquitted and discharged of both charges. Both the were tried together. The accused was not satisfied with the decision of the learned sessions court judge and appealed against the conviction and sentence. The prosecution appealed against inadequacy of the sentence imposed by the learned sessions court judge. The thrust of the prosecution's case was the representation made by the accused to PW2. The accused was representing Lourdes Ventures Consultancy whereas PW2 was representing Temasik Maju Enterprise. The offer for the loan was made by Lourdes Ventures Consultancy to Temasik Maju Enterprise. It was the contention of the accused that: (a) the offer of the loan was made by Lourdes Ventures Consultancy to Temasik Maju Enterprise and that there was no evidence to show that the accused had access or control over the accounts of Lourdes Ventures Consultancy; (b) the learned sessions court judge had erred in fact when he

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A treated the transaction as one made between the complainant and the accused and failed to appreciate the fact that it was a transaction made between two business entities; and (c) that the prosecution had failed to prove dishonesty on the part of the accused and that the Temasik Maju Enterprise did not get the loan.

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Held, allowing the appeal setting aside the conviction and sentence; acquitting and discharging the accused:

(1) The court was of considered view that the learned sessions court judge C could not make a separate and directly opposite and inconsistent finding with regard to the same issue in the present appeal. As alluded to earlier in this judgment, the charges in both cases are in fact one and the same. The court could not comprehend how a different finding may logically be made on the same set of facts and evidence as was done in the present D appeal. The court was of the considered view the findings made by the learned sessions court judge suffered from an improper appreciation of the evidence and had substantially misdirected the trial judge on the facts (see para 41).

E (2) The finding made by the learned sessions court judge that it was the accused who had perpetuated the deceit is against the weight of the evidence adduced by the prosecution. The complainant and Temasik Maju Enterprise could not in law be equated as the same since Temasik Maju Enterprise was a business entity solely owned by Ummi Nazira and not the complainant. In the absence of this it could not be said that the F prosecution had succeeded in proving the element of deceit against the accused if there was no evidence to show that Temasek Maju Enterprise did not receive the RM2m loan (see para 43).

(3) The prosecution had failed to establish a prima facie case against the G accused. There was no credible evidence to establish each and every ingredient of the offence as charged. On the basis of a maximum evaluation of the evidence, the prosecution could not be said to have successfully established a prima facie case against the accused. The accused should not have been called to enter her defence. As the trial H judge had not correctly called for the accused to enter her defence, it would not be necessary for this court to consider the defence (see paras 46–47).

[Bahasa Malaysia summary

I Ini merupakan rayuan tertuduh terhadap sabitan dan hukuman mahkamah sesyen dan rayuan silang pendakwaan terhadap hukuman yang dikenakan tidak memadai. Tertuduh dipertuduhkan bersama-sama dengan Mohd Sirajdeen bin Haja Maideen (Mohd Sirajdeen) untuk kesalahan menipu dibawah s 420 Kanun Keseksaan dibaca bersama s 34 Kanun yang sama.

Diakhir kes pendakwaan, hakim mahkamah sesyen terpelajar telah meminda pertuduhan tersebut dibawah s 158 Kanun Tatacara Jenayah dan tertuduh telah diperintahkan untuk membela diri atas pertuduhan yang dipinda. Di akhir kes pembelaan, hakim mahkamah sesyen telah mensabitkan dan menghukum tertuduh dengan pemenjaraan untuk tempoh tiga tahun dari tarikh tangkap dan denda RM20,000 jika gagal bayar 12 bulan pemenjaraan. Dalam satu kes yang lain Mohd Sirajdeen turut dituduh dengan tertuduh untuk kesalahan yang sama yang dilakukan dengan niat bersama. Dalam kes tersebut, Mohd Sirajdeen turut dituduh untuk kesalahan menjalankan bisnes peminjaman wang tanpa lesen yang sah dibawah s 5(2) Akta Peminjamwang 1951. Dalam kes ini Mohd Sirajdeen akan dilepaskan dan dibebaskan atas kedua-dua pertuduhan. Kedua-dua mereka dibicarakan bersama. Tertuduh tidak berpuas hati dengan keputusan hakim mahkamah sesyen terpelajar dan merayu terhadap sabitan dan hukuman. Pendakwaan merayu terhadap hukuman yang tidak setimpal yang diberikan oleh hakim mahkamah sesyen yang terpelajar. Tunjang kes pendakwaan adalah representasi yang dibuat oleh tertuduh kepada PW2. Tertuduh mewakili Lourdes Ventures Consultancy, dan PW2 mewakili Temasik Maju Enterprise. Ianya adalah hujahan tertuduh bahawa: (a) tawaran pinjaman dibuat oleh Lourdes Ventures Consultancy kepada Temasik Maju Enterprise dan tiada keterangan untuk menunjukan bahawa tiada keterangan untuk menunjukan bahawa tertuduh mempunyai akses atau kawalan terhadap akaun Lourdes Ventures Consultancy; (b) hakim mahakamah sesyen terpelajar telah terkhilaf dalam fakta apabila dia menganggap transaksi tersebut sebagai satu yang dibuat diantara pengadu dan tertuduh dan gagal untuk mengamati fakta bahawa ianya adalah satu transaksi yang dibuat diantara dua entiti perniagaan; dan (c) bahawa pendakwaan gagal untuk membuktikan niat curang pada pihak tertuduh bahawa Temasik Maju Enterprise tidak dapat pinjaman tersebut.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman; melepaskan dan membebaskan tertuduh:

(1) Mahkamah berpandangan bahawa hakim mahkamah sesyen terpelajar tidak boleh membuat satu dapatan yang asing, bertentangan dan tidak konsisten dengan dapatan berkaitan dengan isu yang sama dalam rayuan ini. Sepertimana dinyatakan pada bahagian awal penghakiman ini, pertuduhan dalam kedua-dua kes adalah sama. Mahkamah tidak memahami bagaimana satu dapatan berbeza boleh dibuat berlandaskan fakta dan keterangan yang sama dan keterangan yang dibuat dalam rayuan ini. Mahkamah berpandangan bahawa dapatan yang dibuat oleh hakim mahkamah sesyen yang terpelajar terkhilaf atas sebab pengamaatan keterangan yang tidak sesuai telah menyebabkan hakim bicara tersalah berkenaan dengan fakta (lihat perenggan 41)

(2) Dapatan yang dibuat oleh hakim mahkamah sesyen bahawa tertuduh yang telah melakukan penipuan adalah terhadap keterangan yang

dikemukakan oleh pendakwaan. Pengadu dan Temasik Maju Enterprise merupakan satu entiti perniagaan yang dimiliki oleh Ummi Nazira dan bukan pengadu. Dalam ketiadaan perkara ini, ianya tidak boleh dikatakan bahawa pendakwaan telah berjaya membuktikan inti pati penipuan terhadap tertuduh sekiranya tiada keterangan bahawa Temasek Maju Enterprise tidak menerima pinjaman RM2 juta (lihat perenggan 43).

(3) Pendakwaan gagal untuk membuktikan kes prima facie terhadap tertuduh. Tiada keterangan untuk membuktikan setiap satu inti pati kesalahan sepertimana dipertuduhkan. Atas dasar penilaian maksima keterangan, pendakwaan tidak boleh dikatakan telah membuktikan satu kes prima facie terhadap tertuduh. Tertuduh tidak sepatutnya dipanggil untuk membela diri. Kerana hakim bicara telah terkhilaf semasa memanggil tertuduh untuk membela diri, ianya tidak perlu untuk mahkamah ini menimbangkan pembelaan (lihat perenggan 46–47).]

Cases referred to

Dato' Seri Anwar Ibrahim v PP & another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737; [2004] 1 MLRA 634, FC (refd)
Dickson Levy a/l Maria George v PP [2018] MLJU 98; [2018] 1 LNS 135; [2018] MLRAU 49, CA (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692; [2014] 1 MLRA 92; [2013] 6 AMR 421, FC (refd)
Firman bin Fani v PP [2015] 2 MLJ 264; [2014] 1 LNS 1126; [2014] 6 MLRA 368, CA (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207; [1984] 1 MLRA 126, FC (refd)
Periasamy Sinnappan v PP [1996] 2 MLJ 557; [1996] 3 CLJ 187; [1996] 1 MLRA 277; [1996] 2 AMR 2511, CA (refd)
PP v Ma'arif [1969] 2 MLJ 65; [1969] 1 LNS 134; [1969] 1 MLRH 596 (refd)
Wan Farid Wan Ramli lwn PP [2014] 7 CLJ 218; [2014] MLRAU 237; [2014] AMEJ 0758, CA (refd)

Legislation referred to

Criminal Procedure Code ss 158, 173(m), 316, 415
Moneylenders Act 1951 s 5(2)
Penal Code ss 23, 34, 420

Akmal bt Jusoh (Shah & Hurrie) in Criminal Appeal No WA-42K-16–10 of 2018 for the appellant.
Fatin Hanum bt Abdul Hadi (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No WA-42S-30–09 of 2018 for the appellant.
Fatin Hanum bt Abdul Hadi (Deputy Public Prosecutor, Attorney General's

Chambers) in Criminal Appeal No WA-42K-16–10 of 2018 for the respondent. Akmal bt Jusoh (Shah & Hurrie) in Criminal Appeal No WA-42S-30–09 of 2018 for the respondent.

Ahmad Shahrir JC:

INTRODUCTION

[1] The parties are referred to as they were at the trial court. In Arrest Case No WA-62K-005–01 of 2017 (the present appeal), initially the accused was jointly charged with Mohd Sirajdeen bin Haja Maideen ('Mohd Sirajdeen') for the offence of cheating committed in furtherance of a common intention under s 420 of the Penal Code read together with s 34 of the same Code. At the end of the prosecution's case, the learned sessions court judge amended the charge under s 158 of the Criminal Procedure Code. The accused was then ordered to enter her defence on the amended charge. In the amended charge, only the accused remained charged.

[2] At the end of the defence case, the learned sessions court judge found that the accused has failed to raise a reasonable doubt in the prosecution's case. The accused was convicted and sentenced to imprisonment for the period of three years from the date of arrest and a fine of RM20,000 in default 12 months of imprisonment.

[3] In Arrest Case No WA-62K-098–11 of 2016 (a separate case), Mohd Sirajdeen in turn was jointly charged with the accused for the same offence of cheating committed in furtherance of a common intention under s 420 of the Penal Code read together with s 34 of the same Code. In the same case, Mohd Sirajdeen was also charged for the offence of carrying on the business of moneylending without a valid licence under s 5(2) of the Moneylenders Act 1951. In this case, Mohd Sirajdeen was acquitted and discharged of both charges.

Both Arrest Case No WA-62K-005–01 of 2017 and Arrest Case No WA–62K-098–11 of 2016 were tried together.

[4] The accused was not satisfied with the decision of the learned sessions court judge and appeals against the conviction and sentence. The prosecution appeals against inadequacy of the sentence imposed by the learned sessions court judge.

A THE CHARGE

[5] The original charge proffered against the accused and the charge as amended by the trial court at the end of the prosecution's case, respectively, read as follows:

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Original charge

> Bahawa kamu bersama-sama di antara 17.12.2015 hingga 08.03.2016 di Hotel Shangri-La Kuala Lumpur, di dalam Daerah Dang Wangi di dalam Wilayah Persekutuan Kuala Lumpur, telah dengan curangnya memperdayakan Mohd
C Zaidi bin Zakaria (No. K/P: 850612–05–5039) dalam urusan mendapatkan modal perniagaan RM2 Juta sehingga mendorong beliau untuk menyerahkan wang berjumlah RM80,000.00 secara berperingkat, yang mana beliau tidak akan menyerahkan wang tersebut sekiranya tidak diperdayakan sedemikian. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh
D dihukum di bawah seksyen 420 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

Amended charge (by trial court)

> Bahawa kamu di antara 17.12.2015 hingga 08.03.2016 di Hotel Shangri-La
E Kuala Lumpur, di dalam Daerah Dang Wangi di dalam Wilayah Persekutuan Kuala Lumpur, telah dengan curangnya memperdayakan Mohd Zaidi bin Zakaria (No. K/P: 850612–05–5039) dalam urusan mendapatkan modal perniagaan RM2 Juta sehingga mendorong beliau untuk menyerahkan wang berjumlah RM80,000.00 secara berperingkat, yang mana beliau tidak akan
F menyerahkan wang tersebut sekiranya tidak diperdayakan sedemikian. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan.

THE PROSECUTION'S CASE

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[6] The complainant ('PW2') was introduced to the accused by his friend, Alif. At the material time, Alif knew about the accused through his would-be wife, Siti Hawa, who was the accused's neighbour. The accused was introduced to PW2 as 'Dato' Seri Rita'. Siti Hawa told PW2 that the accused was a
H successful entrepreneur.

[7] PW2 wanted to get a loan for Temasik Maju Enterprise. Temasik Maju Enterprise was a business entity owned by PW2's wife, Ummi Nazira bt Naemat ('Ummi Nazira'). For that purpose, PW2 communicated with the
I accused through telephone calls and WhatsApp messages. At the material time, PW2 was still married to Ummi Nazira. PW2 and Ummi Nazira had divorced when the trial commenced.

[8] PW2 met the accused on three occasions. The first meeting was on 17

December 2015 at about 10.30pm at the Shangri-La Hotel, Kuala Lumpur. In the meeting, PW2 and the accused discussed about a RM1m loan and PW2 delivered to the accused the loan application form. The second meeting took place at the same hotel on 18 December 2015 at about 5.20pm. During this meeting, PW2 gave the accused RM5,000 to be given to the accused's auditors as a payoff because PW2 was earlier informed that based on the loan application, Temasik Maju Enterprise may not be eligible for the loan. The third meeting was on 17 January 2016 at the Cititel Hotel, Mid Valley Megamall, Kuala Lumpur. During this meeting, PW2 agreed with the accused's suggestion to apply for a RM2m loan instead. For the RM2m loan, PW2 was required to pay RM80,000 as the processing fee. Prior to the third meeting, Mohd Sirajdeen went to the business premises of Temasik Maju Enterprise at Senawang, Seremban. Mohd Sirajdeen told PW2 that he was sent by the accused to audit the business for purposes of the loan application.

[9] On 23 February 2016, PW2 received a WhatsApp message from the accused. According to the message, the letter of approval for the loan has been issued. The letter of approval dated 23 February 2016 was issued by Lourdes Ventures Consultancy to Temasik Maju Enterprise ('exh P3'). It was signed by Mohd Sirajdeen. On 27 February 2016, PW2 then paid the sum of RM80,000 into the account of Lourdes Ventures Consultancy. The RM80,000 consisted of 11 cash deposits amounting to RM55,000 made by PW2 himself and another transaction of RM25,000 made by one Ardnan. According to PW2, the RM25,000 was the proceeds for the sale of his car to Ardnan and PW2 had instructed Ardnan to remit that amount into the account of Lourdes Ventures Consultancy.

[10] Later, on the same day, PW2 and his wife met the at the Secret Recipe restaurant in Senawang. During this meeting, PW2's wife signed the loan agreement. On 1 March 2016, PW2 met with Mohd Sirajdeen at UTC, Pudu Sentral. Again, PW2 was accompanied by his wife. The purpose of this meeting was to appoint Mohd Sirajdeen as one of the directors for Temasik Maju Enterprise as a security for the loan. They later went to the CIMB Bank Bhd at Setiawangsa, Kuala Lumpur to open a new account for Temasik Maju Enterprise and to include Mohd Sirajdeen as one of the authorised signatories.

[11] A week later, PW2 telephoned the accused asking about the loan. The accused had earlier allegedly promised PW2 that the loan would be disbursed within five days. According to PW2, the accused started giving him excuses. PW2 became suspicious of the accused and later made a company search at the Companies Commission of Malaysia. From the company search, PW2 found out that Lourdes Ventures Consultancy belonged solely to Mohd Sirajdeen. It did not belong to the accused. PW2 then lodged a police report.

A THE DEFENCE'S CASE

[12] The accused ('DW1') met one Rakesh Al Fayed ('Rakesh') in early October 2015. Rakesh told the accused that his company is able to give out loans up to RM10m. Later, the accused told Siti Hawa about Rakesh's company and Siti Hawa related to the accused about her friend, PW2. Siti Hawa told the accused that PW2 operates a photocopying business but ran into financial difficulties. According to Siti Hawa, PW2 was almost booted out from the business premises due to unpaid monthly rentals.

[13] The accused first met PW2 at her sundry shop in Senawang, Seremban. At that time, PW2 told the accused that he wanted to get a loan of RM50,000 but would not mind more as he wanted to acquire a petrol station at Simpang Ampat, Malacca, settle his 'Tekun' loans and for other matters. The accused met PW2 for the second time at the Shangri-La Hotel, Kuala Lumpur. During the meeting, the accused communicated with Rakesh about PW2 wanting to get a loan. Rakesh told the accused to handle and treat PW2 as her own client.

[14] The accused later met Rakesh at the Sunway Hotel. In that meeting, PW2 called the accused and inquired about the documents required for the purposes of the loan application. Rakesh took the accused's handphone and keyed-in the list of documents required. The accused then sent the list to PW2. Rakesh told the accused that PW2 needed to pay a processing fee of 4% of the loan sum and that Mohd Sirajdeen will visit the business premises of Temasik Maju Enterprise. Mohd Sirajdeen too must be added as one of the 'directors' and authorised signatories for Temasik Maju Enterprise as security for the loan. Rakesh also asked the accused to handle PW2's loan application and for that purpose to treat his (Rakesh) company as hers.

[15] Later, Rakesh gave to the accused a loan agreement for PW2. The accused in turn delivered the loan agreement to PW2 at the Secret Recipe restaurant in Senawang. The loan agreement was to be stamped and returned to Rakesh.

[16] The accused's former employee, Zainora bt Wagiman ('DW2') had access to the accused email. DW2 said she was tasked to manage the accused's email and had access to the accused's emails. Even during the trial itself after DW2 left her employment, DW2 could still access the accused's emails because the accused did not change the password.

[17] According to DW2, there was an email from PW2 to the accused. In that email, PW2 sent a business proposal for Temasik Maju Enterprise. According to DW2, she understood the email to be an application for a loan from Temasik Maju Enterprise because at p 9 of the business proposal which

was attached to the email, it was stated 'Berdasarkan pengiraan, projek ini dapat membayar balik jumlah pinjaman yang kami mohon'. A

BRIEF DELIBERATIONS

Contention of the accused/appellant B

[18] According to the learned counsel, the thrust of the prosecution's case was the representation made by the accused to PW2. The accused was representing Lourdes Ventures Consultancy whereas PW2 was representing Temasik Maju Enterprise. The offer for the loan was made by Lourdes Ventures Consultancy to Temasik Maju Enterprise. The evidence shows that payment was made to Lourdes Ventures Consultancy and there was no evidence to show that the accused had access or control over the accounts of Lourdes Ventures Consultancy. The fact of the matter is, the offer for the loan was never made to PW2 but it was made to Temasik Maju Enterprise. C D

[19] The learned counsel contends that the learned sessions court judge had erred in facts when he treated the transaction as one which was made between the accused and PW2. The learned sessions court judge had failed to appreciate the fact that the transaction was between two business entities, namely between Lourdes Ventures Consultancy and Temasik Maju Enterprise. Even PW2 agreed that the loan was not for him but it was for Temasik Maju Enterprise. E

[20] It is the submissions of the learned counsel that in relation to the charge, the prosecution had failed to lead evidence to prove the very borrower who intended to get the loan and the person who was supposed to give the loan. The learned counsel contends that the prosecution has failed to prove dishonesty on the part of the accused as an essential ingredient of the offence. The prosecution too has failed to prove that Temasik Maju Enterprise did not get the loan. F G

Contention of the prosecution/respondent

[21] The learned DPP contends that the learned sessions court judge had properly considered the evidence on a maximum evaluation and found the accused guilty as charged. The learned DPP contends that remittance of the RM80,000 to the account of Mohd Sirajdeen was made on the instructions of the accused although the accused had no control or access to the account. The loan agreement too was delivered to PW2 by the accused. There was no basis for the accused to hold herself out to be a representative of Lourdes Ventures Consultancy because the accused was not the owner of the business. H I

[22] The fact that the loan application was made by PW2 on behalf of Temasik Maju Enterprise although the business was not owned by PW2 is not

relevant. The learned DPP submits that the learned sessions court judge had rightly found that the defence was an afterthought and had rightly found that the defence has failed to raise a reasonable doubt in the prosecution's case. The defence too has failed to call Rakesh as a witness to establish that Rakesh was not fictitious.

ANALYSIS AND DECISION

[23] In hearing an appeal from a subordinate court, the duty of this court is provided for under s 316 of the Criminal Procedure Code.

Section 316 of the Criminal Procedure Code provides as follows:

> 316 Decision on appeal
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> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be retried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence —
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried; or
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> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[24] It is trite that in exercising its appellate powers, the High Court should properly consider and carefully weigh matters such as:

(a) the views of the trial judge on the credibility of witnesses;

(b) the presumption of innocence in favour of the accused;

(c) the right of the accused to the benefit of any doubt; and

(d) the slowness of an appellate court in disturbing a finding of fact arrived at by a trial judge who had the advantage of seeing the witnesses.

(See: *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207; [1984] 1 MLRA 126 (FC) and *Periasamy Sinnappan v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187; [1996] 1 MLRA 277; [1996] 2 AMR 2511 (CA)).

[25] At the conclusion of the trial, the trial court is under the statutory duty pursuant to s 173(m) of the Criminal Procedure Code to consider whether the prosecution has succeeded in proving its case beyond a reasonable doubt.

Section 173(m) of the Criminal Procedure Code reads as follows:

> 173 The following procedure shall be observed by Magistrates in summary trials:
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> (m)(i) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (ii) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it and the Court shall pass sentence according to law.
>
> Provided that before the Court passes sentence, the Court shall, upon the request of the victim of the offence or the victim's family, call upon the victim or a member of the victim's family to make a statement on the impact of the offence on the victim or his family; and where the victim or a member of the victim's family is for any reason unable to attend the proceedings after being called by the Court, the Court may at its discretion admit a written statement of the victim or a member of the victim's family.
>
> (iii) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[26] In *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692; [2014] 1 MLRA 92; [2013] 6 AMR 421 (FC), the apex court made the following observations in respect of the duty cast upon the appellate courts when considering decisions of the trial courts:

> [22] It is trite that being an appellate court it is our task in this case to review and consider the decision of the courts below. We need to determine whether on the evidence adduced the defence was rightly called. If so, whether the defence had raised a reasonable doubt in the prosecution's case. And even if it did not it is still essential that to sustain the convictions it must be determined whether the prosecution had proved its case beyond reasonable doubt.

[27] Cheating is defined under s 415 of the Criminal Procedure Code. It provides as follows:

> 415 Cheating
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> Whoever by deceiving any person, whether or not such deception was the sole or main inducement —
>
> (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,

is said to 'cheat'.

[28] In a charge for cheating under s 420 of the Criminal Procedure Code, it is incumbent on the prosecution to prove the following ingredients:

(a) that there was deception practised by the accused;

(b) that the accused dishonestly induced the person so deceived —

(i) to deliver any property to any person, or

(ii) to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security.

Section 420 of the Penal Code reads as follows:

420 Cheating and dishonestly inducing delivery of property

Whoever cheats and thereby dishonestly induces the person deceived, whether or not the deception practiced was the sole or main inducement, to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

The term 'dishonestly' which appears in s 420 of the Penal Code is defined under s 24 as follows:

24 'Dishonestly'

Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.

and the expression 'wrongful gain' and 'wrongful loss' in s 24 is defined in s 23 of the Penal Code as follows:

23 'Wrongful gain' and 'wrongful loss'

'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled. 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires

wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[29] An appeal is merely a continuation of trial and the evidence adduced at the trial stage is opened to this court at the appellate stage for re-examination to determine whether or not the findings made by the trial court is correct. This principle is enunciated in the case of *Public Prosecutor v Ma'arif* [1969] 2 MLJ 65; [1969] 1 LNS 134; [1969] 1 MLRH 596 and affirmed by the Court of Appeal in *Dickson Levy a/l Maria George v Public Prosecutor* [2018] MLJU 98; [2018] 1 LNS 135; [2018] MLRAU 49 (CA). It thus incumbent upon this court to review the evidence adduced by the prosecution and the defence to determine the correctness of the decision of the learned sessions court judge.

[30] For the offence of cheating alleged to have been committed in furtherance of a common intention under s 420 read together with s 34 of the Penal Code, the prosecution proffered two separate charges against the accused and Mohd Sirajdeen under two separate cases. In order to appreciate the significance of these two charges, I reproduce the respective case numbers and the relevant charges as follows:

Arrest Case No WA-62K-098–11/2016

Arrest Case No WA-62K-098–11/2016 Public Prosecutor v Mohd Sirajdeen bin Haja Maideen

Bahawa kamu bersama-sama di antara 17.12.2015 hingga 08.03.2016 di Hotel Shangri-La Kuala Lumpur, di dalam Daerah Dang Wangi di dalam Wilayah Persekutuan Kuala Lumpur, telah dengan curangnya memperdayakan Mohd Zaidi bin Zakaria (No. K/P: 850612 – 05 – 5039) dalam urusan mendapatkan modal perniagaan RM2 Juta sehingga mendorong beliau untuk menyerahkan wang berjumlah RM80,000.00 secara berperingkat, yang mana beliau tidak akan menyerahkan wang tersebut sekiranya tidak diperdayakan sedemikian. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

Arrest Case No WA-62K-005–01/2017

Arrest Case No WA-62K-005–01/2017 Public Prosecutor v. Rita Maziha Binti Pauzi

Bahawa kamu bersama-sama di antara 17.12.2015 hingga 08.03.2016 di Hotel Shangri-La Kuala Lumpur, di dalam Daerah Dang Wangi di dalam Wilayah Persekutuan Kuala Lumpur, telah dengan curangnya memperdayakan Mohd Zaidi bin Zakaria (No K/P 850612–05–5039) dalam urusan mendapatkan modal perniagaan RM2 Juta sehingga mendorong beliau untuk menyerahkan wang berjumlah RM80,000.00 secara berperingkat, yang mana beliau tidak akan menyerahkan wang tersebut sekiranya tidak diperdayakan sedemikian. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[31] Both cases were tried together. The same witnesses were called by the prosecution. The facts and evidence in both cases were the same. In Arrest Case No WA-62K-098–11 of 2016, the learned sessions court judge acquitted and discharged Mohd Sirajdeen at the close of prosecution without calling for Mohd Sirajdeen to enter his defence. However, in Arrest Case No WA-62K-005–01 of 2017 (the present appeal), the learned sessions court judge made a finding of a prima facie case on a charge as amended by the trial court under s 158 of the Criminal Procedure Code. When the charge was amended by the trial judge, the amended charge states that the accused was the sole offender alleged to have committed the offence under s 420 of the Penal Code. There was no longer a joint charge with a common intention together with Mohd Sirajdeen. At the end of the defence's case, the learned sessions court judge convicted the accused.

[32] In acquitting and discharging Mohd Sirajdeen without calling for his defence, the findings of the learned sessions court judge at the end of the prosecution's case may be summarised as follows:

(a) PW2 admitted that he had never met Mohd Sirajdeen. All discussions were made between PW2 and the accused in the present appeal;

(b) PW2 only met Mohd Sirajdeen when he came to the business premises of Temasik Maju Enterprise to carry out the audit. The subsequent meetings between PW2 and Mohd Sirajdeen occurred at the UTC, Pudu Sentral when PW2 registered Mohd Sirajdeen as one of the 'directors' for Temasik Maju Enterprise and at CIMB Setiawangsa when Mohd Sirajdeen was appointed as one of the authorised signatories for Temasik Maju Enterprise;

(c) if PW2 had never met Mohd Sirajdeen to discuss about the loan, it cannot be said that it was Mohd Sirajdeen who had deceived PW2;

(d) PW2 had consistently said that it was the accused in the present appeal —

(i) who had offered him the loan;

(ii) who communicated with him;

(iii) who had met with him for a few times;

(iv) who discussed about the loan and the interest rates;

(v) who had convinced PW2 to apply for the loan;

(vi) who had instructed PW2 to pay the RM80,000 into the account of Lourdes Ventures Consultancy; and

(vii) who had convinced PW2 that the loan was being processed and will be approved;

(e) in respect of the RM80,000 payment made into the account of Lourdes Ventures Consultancy:

(i) remittance of the sum of RM55,000 was evidenced by PW2's bank statements (exh P17), but

(ii) there was no evidence to show remittance of the sum of RM25,000 by Ardnan purportedly as proceeds of sale of PW2's car to Ardnan. Neither was there any documents to show the alleged sale of PW2's car to Ardnan. Failure of the prosecution to call Ardnan resulted has led the court to disbelieve the fact that the total sum of RM80,000 was in fact delivered as a result of the deception;

(f) there was no evidence to show that Mohd Sirajdeen had the dishonest intention; and

(g) other than the act of Mohd Sirajdeen in carrying out the audit of Temasik Maju Enterprise, there was no evidence to show any criminal act committed on the part of Mohd Sirajdeen together with the accused to prove common intention as distinguished from the acts of the accused independent of Mohd Sirajdeen.

[33] In finding a prima facie case against the accused on the charge as amended by the court, the learned sessions court judge made the following findings:

(a) the accused was the one who had played the role in offering PW2 the loan from Lourdes Ventures Consultancy;

(b) Mohd Sirajdeen did not play any part in meeting and discussing about the loan with PW2;

(c) the accused had deceived PW2 in obtaining the loan of RM2m;

(d) in respect of the RM80,000 payment made into the account of Lourdes Ventures Consultancy:

(i) remittance of the sum of RM55,000 was evidenced by PW2's bank statements (exh P17); and

(ii) the defence has failed to challenge, dispute or raise any doubt in the evidence of PW2 about the sale of his car to Ardnan and the RM25,000 remitted by Ardnan being the proceeds of the sale;

(e) the business search (exh P19) issued by the Companies Commission of Malaysia showed that Lourdes Ventures Consultancy was solely owned by Mohd Sirajdeen and not the accused;

(f) the accused had knowledge that Lourdes Ventures Consultancy could not carry on the business of money lending and giving the loan to PW2 as it was not licensed as such; and

(g) other than the act of Mohd Sirajdeen in carrying out the audit of Temasik Maju Enterprise, there was no evidence to show any criminal act committed on the part of Mohd Sirajdeen together with the accused to prove common intention as distinguished from the acts of the accused independent of Mohd Sirajdeen.

[34] In this instance, it is observed that in both Arrest Case No WA-62K-098–11 of 2016 and Arrest Case No WA-62K-005–01 of 2017 (the present appeal), the respective charges relate to the very same exact offence alleged to have been jointly committed by Mohd Sirajdeen and the accused on the same date, at the same place and against the same victim (PW2). However, in Arrest Case No WA-62K-098–11 of 2016 the title of the proceedings only bears Mohd Sirajdeen's name whereas in Arrest Case No WA-62K-005–01 of 2017 (the present appeal), the title of the proceedings only bears the accused's name. Since both Mohd Sirajdeen and the accused are jointly accused of the exact same offence, there should have been only one charge for both of them. Respectfully, I find the presence of two separate charges for each Mohd Sirajdeen and the accused for the same offence had somewhat caused confusion to the learned sessions court judge in his findings notwithstanding the fact that the charge in Arrest Case No WA-62K-005–01 of 2017 (the present appeal) was amended by the trial judge at the end of the prosecution's case.

[35] In Arrest Case No WA-62K-098–11 of 2016, the learned sessions court judge made a finding that the prosecution has failed to prove that the total sum of RM80,000 was remitted into the account of Lourdes Ventures Consultancy. However, in Arrest Case No WA-62K-005–01 of 2017 (the present appeal), the learned sessions court judge made a finding that the prosecution has succeeded in establishing the fact that RM80,000 was remitted into the account of Lourdes Ventures Consultancy because the accused in the present appeal had failed mount a challenge on the RM25,000 which was part of the RM80,000.

[36] Turning to the ingredients of the offence, the prosecution sought to prove that it was PW2 who was allegedly deceived into believing that he would be able to secure a loan of RM2m if he pays the sum of RM80,000 as the processing fee as described in the charge. However, as it turned out, the evidence shows that the loan attempted to be secured was meant for Temasik Maju Enterprise and not PW2. For that alleged representation by the accused to be deceitful, it must be proved that Temasik Maju Enterprise did not receive the loan. Thus, the question remains whether Temasik Maju Enterprise in fact did not receive the RM2m loan as allegedly represented by the accused.

[37] In considering whether the trial court has correctly arrived at its findings of facts and to determine whether there are substantial and compelling

reasons for the appellate court to disagree, it is incumbent for the appellate court to examine the evidence and circumstances under which that finding was made (see *Dato' Seri Anwar Ibrahim v Public Prosecutor & another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737; [2004] 1 MLRA 634 (FC)). In *Wan Farid Wan Ramli lwn Public Prosecutor* [2014] 7 CLJ 218; [2014] MLRAU 237; [2014] AMEJ 0758 (CA), the Court of Appeal held, inter alia, as follows:

> (2) The Court of Appeal will not generally disturb the findings of facts as made by the trial judge since the trial judge, as the trier of facts, was privileged with audio-visual advantage. Notwithstanding that, it is always open for this court to interfere if the findings thus made were unsupported by evidence or against the weight of evidence, or if there was no proper judicial appreciation of the evidence or if there was any misdirection in law.

[38] Central to the charge of cheating under s 420 of the Penal Code in the present appeal is the element of fraudulent or dishonest deception by the accused towards PW2 to deliver the RM80,000 to Temasik Maju Enterprise. Deception by the accused must be proved. Delivery by PW2 of the sum of RM80,000 to Temasik Maju Enterprise as a result of the dishonest deception by the accused must be proved. And in order to prove the dishonest intention, the intention on the part of the accused to cause wrongful gain to one person or wrongful loss to another person must be proved although proof of actual wrongful gain or wrongful loss is immaterial.

[39] The prosecution sought to show by the evidence that the person deceived was PW2. It is thus pertinent to analyse the evidence presented by the prosecution at the trial court to consider whether the element of deceit had in fact been proved. The alleged deceit relates to payment of RM80,000 processing fee for a RM2m loan. It is the prosecution's case that payment of the RM80,000 was remitted by PW2 to Lourdes Ventures Consultancy and the RM2m loan was intended for Temasik Maju Enterprise. It follows therefore that there must be credible evidence to show that PW2 did remit the RM80,000 to Lourdes Ventures Consultancy and Temasik Maju Enterprise did not receive the RM2m loan.

[40] The learned sessions court judge has made a finding in Arrest Case No WA–62K-098–11 of 2016 that the prosecution has failed to prove that PW2 did make the payment of the total sum of RM80,000 to Lourdes Ventures Consultancy. Save for the sum of RM55,000 remitted by PW2 himself, the learned sessions court judge made a finding that remittance of the balance of RM25,000 was not proved by the prosecution because Ardnan, who purportedly made the remittance on behalf of PW2 being the proceeds of sale of PW2's car, was not called by the prosecution as a witness. There was also no documentary evidence to substantiate the alleged sale of PW2's car.

[41] Since the learned sessions court judge has made this finding in Arrest Case No WA–62K-098–11 of 2016, I am of the considered view that the learned sessions court judge could not make a separate and directly opposite and inconsistent finding with regard to the same issue in Arrest Case No WA-62K-005–01 of 2017 (the present appeal). As alluded to earlier in this judgment, the charges in both cases are in fact one and the same. Respectfully, I could not comprehend how a different finding may logically be made on the same set of facts and evidence as was done in the present appeal. I am of the considered view the findings made by the learned sessions court judge on this score suffers from an improper appreciation of the evidence and had substantially misdirected the trial judge on the facts.

[42] A further scrutiny of the evidence shows that Temasik Maju Enterprise was solely owned by PW2' ex-wife, Ummi Nazira. Ummi Nazira was not called as a witness by the prosecution neither was there any document or letters from Temasik Maju Enterprise to evidence the fact that it did not receive the RM2m loan. The trial judge merely accepted the evidence of PW2 to prove the fact that Temasik Maju Enterprise did not receive the RM2m loan whereas PW2 was not a partner in the business of Temasik Maju Enterprise neither was he an employee or an authorised representative for Temasik Maju Enterprise capable of confirming the fact that Temasik Maju Enterprise did not receive the RM2m loan.

[43] PW2 and Temasik Maju Enterprise could not, in law, be equated as the same since Temasik Maju Enterprise is a business entity solely owned by Ummi Nazira and not PW2. There was also no evidence to show whether PW2 was a signatory to or had access to the accounts of Temasik Maju Enterprise. In the absence of all these, how could it be said the prosecution has succeeded in proving the element of deceit against the accused if effectively there was no evidence to show that Temasik Maju Enterprise did not receive the RM2m loan? In this regard, I am of the considered view that the finding made by the learned sessions court judge that it was the accused who had perpetuated the deceit is against the weight of the evidence thus adduced by the prosecution.

[44] The rule that an appellate court should be slow in disturbing the findings of facts made by the trial court is not without exception. The Court of Appeal restated these principles in the case of *Firman bin Fani v Public Prosecutor* [2015] 2 MLJ 264; [2014] 1 LNS 1126; [2014] 6 MLRA 368 (CA) in the following prose:

> We were aware that as an appellate court, we should be slow to interfere with findings of fact made by the trial court. The rationale for that principle has been premised on the consideration that the trial court has the audio-visual advantage of listening to and observing the demeanour of the witnesses before it, which benefit

the appeal court does not similarly possess. However, like all general rules, it is not without exception.

[45] Speaking for the Court of Appeal in *Firman*'s case, His Lordship Abang Iskandar Abang Hashim JCA further remarked as follows:

> In the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 the Federal Court had stated that the strength of the prosecution's evidence at the end of its case, after it has been subject to the maximum evaluation by the court, must be such that it is at such a level that if the accused chooses to remain silent the court must be able to convict him. Only if the court is satisfied that such threshold has been achieved by the prosecution's case that it is justified to call the accused to enter on his defence to the charge that is preferred against him. Anything short of that will not suffice. Indeed, in the *Mohd Radzi's* case it was reiterated by the apex court that this exercise of maximum evaluation by the trial court must of necessity involve an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution's evidence admits of two or more inferences, one which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.

CONCLUSION

[46] After carefully sifting through the record of appeal and considering the submissions of both the learned counsel and the learned DPP, I hold the considered view that the prosecution in fact had failed to establish a prima facie case against the accused. There was no credible evidence to establish each and every ingredient of the offence as charged.

[47] The prosecution could not, on the basis of a maximum evaluation of the evidence, be said to have successfully established a prima facie case against the accused. The accused should not have been called to enter her defence. Since the trial judge had not correctly called for the accused to enter her defence, it would not be necessary for this court to consider the defence.

[48] Based on the reasons as aforesaid, I hereby allow the appeal by the accused and set aside the conviction and sentence. The accused is hereby acquitted and discharged of the offence as charged. Any fine, if paid, shall be refunded. On the same note, the appeal by the prosecution against sentence is hereby dismissed.

A *Appeal allowed, conviction and sentence set aside; accused acquitted and discharged.*

Reported by Izzat Fauzan

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